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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RAUL CARRILLO ALDERETE, Defendant and Appellant.	B210735 (Los Angeles County Super. Ct. No. KA078107)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Modified and affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Daniel C. Chang, Chung L. Marr and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Raul Alderete was convicted of numerous crimes, including corporal injury to a cohabitant, kidnapping to commit rape and oral copulation, several sex crimes, assault with a deadly weapon, and child custody deprivation. He appeals from the judgment of conviction, claiming CALJIC No. 2.50.1 allows the jury to convict on a lesser standard than beyond a reasonable doubt. The Supreme Court has upheld this instruction, and we thus reject this contention. Appellant also claims there is insufficient evidence to support his conviction for deprivation of the right to child custody under Penal Code section 278.5, that imposition of an upper term sentence on count 1 violated his right to jury trial as expressed by the Supreme Court in *Cunningham v. California* (2007) 549 U.S. 270, and that his sentence constitutes cruel and unusual punishment in violation of the state and federal constitutions. We find no grounds for reversal. Appellant also claims he is entitled to conduct credits. Respondent agrees, and we shall modify his sentence accordingly.

FACTUAL AND PROCEDURAL SUMMARY

Appellant and 18-year-old Jane Doe met in 2006 while working at a Walmart store in Upland. Appellant was married and had children, but was separated from his wife, Desiree. He and Jane Doe dated, then broke up for a few months. During that time, appellant attempted to reconcile with his wife, and Jane Doe began dating someone else. During the summer of 2006, appellant and Jane Doe resumed their dating relationship. Appellant was jealous and angry, and became physically abusive. At various times, he hit her with a closed fist in the face and ribs, kicked her in the mouth, dragged her by the hair and choked her. On two occasions, appellant broke her nose. Jane Doe stayed with him "[b]ecause I loved him."

According to Jane Doe, in December 2006, appellant decided they should move to Texas "to start over fresh with me as far as not hitting me no more and, . . . just starting a new life, basically." Appellant also wanted to be near his pregnant wife and their two sons, who had moved to Texas. Appellant and Jane Doe lived with appellant's nephew, Frederick. Appellant was nicer to Jane Doe the first two days, but then became

aggressive with her. He was verbally abusive, hit her, and on one occasion, threw a pocket knife at her. The day after the knife incident, Jane Doe told Frederick's girlfriend what had been happening. With the girlfriend's help, Jane Doe left the house. She flew back to California on a ticket bought by her mother.

Less than a week later, in early January 2007, appellant contacted Jane Doe through her MySpace page. She agreed to meet him "one last time" to pick up her clothing she had left in Texas. Appellant convinced Jane Doe that he still loved her and would not let her go. They drove off together and began living together. They were essentially homeless, living some of the time in appellant's car, and at other times in an abandoned apartment in Pomona. During this time they smoked methamphetamine, and appellant hit and beat Jane Doe.

On February 6, 2007, they were in the abandoned apartment and appellant kicked Jane Doe hard in leg. Appellant was called out of the room by his friends, and he told her to wait there, that he would deal with her later. Understanding that he would return and beat her, Jane Doe jumped out of the second story window, ran down the street, jumped into a passing car and was driven to Pomona Valley Hospital. While Jane Doe was being examined, Officer Christina Howard arrived at the hospital to talk to her about the suspected domestic violence. Jane Doe told the officer to mind her own business. She did not want to get appellant in trouble. The officer gave Jane Doe a business card, and asked the hospital staff to provide her with a list of domestic violence shelters.

Jane Doe was waiting for a taxi to transport her to one of the shelters when appellant sneaked in and convinced her to leave with him. They ended up back at the abandoned apartment. Over the next few days, sometimes appellant was nice to Jane Doe, and sometimes he was mean. Two incidents occurred on February 10 and 11, 2007: appellant choked Jane Doe until her body went into convulsions and she passed out, and he forced her to lie down on a bench in the apartment and repeatedly pushed a beer bottle into her vagina.

On the night of February 11, appellant made Jane Doe walk with him to his sister's apartment so he could borrow a car to drive her to the mountains and kill her. During the walk, appellant stabbed her numerous times with a screwdriver.

Appellant's wife and their children were staying with appellant's sister. Jane Doe heard appellant tell his wife "he had to take me out because, if not, I could put him away for a long time." Eventually appellant and Jane Doe walked to the garage and got into a car. Appellant went back and forth between the apartment and the car. While he was gone, Jane Doe hid the screwdriver and some scissors in the front seat to conceal them from appellant. She spread some of the blood from her stab wounds on the interior of the car and made fingerprint marks on the surfaces of the car so that if she were to die, police could determine where she had been.

While in the car, appellant demanded that Jane Doe perform oral sex. She complied because "if I didn't, he would hit me." During the act, appellant hit her head with a closed fist. Later, he forced a flashlight into her vagina, repeatedly putting it in and out. He also hit her on the leg with a long metal bar.

Appellant's wife came into the garage as morning approached. She noticed that Jane Doe's face was swollen. Appellant kept asking Jane Doe if she was okay. She told him her head was hurting and that she needed to go to the hospital. She also told him she wanted his wife to stay with her. He drove them to the hospital and she promised appellant she would come back.

Inside the hospital, Jane Doe spoke with Pomona Police Officer Jeffrey Hayward, and then with two detectives about what had happened. She was examined by a nurse specializing in sexual assault forensic examinations. Jane Doe had multiple puncture wounds and bruises on her face, chest, and everywhere on her body except her abdomen, as well as tearing in her vaginal area. The injuries were consistent with the history she gave.

Appellant spoke with an officer at the Pomona Police Department by telephone the next day, and was told to come into the station. He never did. Appellant left the area and went into hiding.

On December 12, 2007, appellant knocked on the door of his wife's residence in North Hollywood. She saw appellant and went to the back of the house to call the police. Appellant entered the house and told her he just wanted to see the baby and the children. While his wife was on the telephone, appellant left the house with the baby. Appellant called his wife to tell her that he had the baby and that she was fine. He kept the baby for less than a week, leaving her at a pastor's house for his wife to pick up.

Appellant was arrested in January 2008. After a trial by jury, he was convicted of two counts of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a))[1]; two counts of kidnapping to commit rape and oral copulation (§ 209, subd. (b)(1); forcible rape (§ 261, subd. (a)(2)); two counts of forcible oral copulation (§ 288a, subd. (c)(2)); two counts of sexual penetration by foreign object (§ 289, subd. (a)(1)); assault with a deadly weapon with personal use of a deadly and dangerous weapon (§§ 245, subd. (a)(1), 12022, subd. (b)(1)); and child custody deprivation (§ 278.5, subd. (a)). The jury also found true several great bodily injury allegations and special "one-strike" law sexual offense allegations. Appellant was sentenced to state prison for a determinate term of 13 years, 8 months, consecutive to two indeterminate life terms, consecutive to an indeterminate term of 125 years to life. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Over appellant's objection, the court instructed the jury in terms of CALJIC No. 2.50, which allows the jury to consider whether a characteristic method, plan, or scheme used in other crimes was similar to the method, plan or scheme used in the charged crimes, which would then tend to show the appellant's intent in the charged crimes. The jury was then instructed in terms of CALJIC No. 2.50.1 that "Within the meaning of the preceding instruction, the prosecution has the burden of proving by a

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[1] All statutory references are to the Penal Code unless otherwise indicated.

preponderance of the evidence that the defendant committed a crime or sexual offense other than those for which he is here on trial. [¶] You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that the defendant committed the other crimes or sexual offenses. [¶] If you find the other crimes were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime."

Appellant claims these instructions were unnecessary in this case because the issue of intent regarding the charged offenses was "straightforward. Either appellant did the offenses in the manner testified to by Doe or he did not." This argument ignores the prosecution's burden to prove every element of a crime, even if the defense does not challenge that element. (*People v. Magee* (2003) 107 Cal.App.4th 188, 193.) The prosecution was required to prove that appellant committed the charged acts with the requisite intent. The instructions properly informed the jury that appellant's prior acts could be considered on the question of appellant's intent in committing the charged acts.

Appellant also claims these instructions lessened the prosecution's burden of proof because the prior acts could be proved by the preponderance of the evidence standard. CALJIC No. 2.50.1 explicitly states that "before a defendant can be found guilty of any crime charged or any included crime in this trial, the evidence as a whole must persuade you *beyond a reasonable doubt* that the defendant is guilty of that crime." (Italics added.)

In *People v. Reliford* (2003) 29 Cal.4th 1007, the Supreme Court rejected a challenge to an earlier—and less explicit—version of CALJIC No. 2.50.1: "We do not find it reasonably likely a jury could interpret the instructions to authorize conviction of the charged offenses based on a lowered standard of proof. Nothing in the instructions authorized the jury to use the preponderance-of-the-evidence standard for anything other than the preliminary determination whether defendant committed [the] prior sexual

offense . . . ." (29 Cal.4th at p. 1016.) Based on this authority, we reject appellant's claim.

II

Appellant next claims there was insufficient evidence to support his conviction of deprivation of child custody in violation of section 278.5, subdivision (a), because both he and his wife, Desiree, were lawful custodians of the child. Section 278 makes it a crime for a person "not having a right to custody," to maliciously take, entice away, keep, withhold or conceal a child from his or her lawful custodian. In contrast, section 278.5, subdivision (a), contains no requirement that the perpetrator be a person who does not have a right to custody, just that the child be taken from a person who does have a right to custody. The statute provides: "*Every person* who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation," shall be punished by imprisonment in the county jail, or in state prison. (Italics added.) This distinction fills a gap left by the Legislature in section 278. (See *Cline v. Superior Court* (1982) 135 Cal.App.3d 943, 947.) Appellant's right to custody does not prevent his conviction under section 278.5.

He next argues that there is no evidence that he had the requisite intent to deprive Desiree of her right to custody. The statute requires the specific intent to deprive a lawful custodian of the child of the physical custody of the child. (See *People v. Lortz* (1982) 137 Cal.App.3d 363, 371.)

Desiree testified that while appellant was a fugitive, the police had come to speak with her. They instructed her to call them if appellant came in contact with her. On the night of December 12, 2007, appellant knocked at her door. He told her he wanted to see the baby and the other children and then he would leave. Desiree explained that she could not invite him in because the police were looking for him and she did not want to get into trouble for aiding and abetting. She went to the back house to call the police. While she was there, appellant left the house. Desiree was shocked when she discovered appellant had taken the baby. But appellant called her while the police were still at her house and told her he had the baby and she was fine. "And so I guess I didn't have time

to cry or anything because he called me in time and let me know that she was okay, and that calmed me down."

Los Angeles Police Officer Douglas Bowler testified that he responded to a disturbance call at Desiree's home. She told the officer that appellant had taken their baby. Although Desiree testified that she did not feel threatened by appellant taking the baby, Officer Bowler testified that she appeared to be angry and frightened, and she was shaking. Desiree explained to him that she had moved and concealed her address from appellant in order to get away from him. She told the officer "she moved there to get away from him, and now that the baby was gone, she was concerned for the baby's safety." Appellant kept the baby for several days, then left her at a pastor's house where Desiree picked her up.

This evidence establishes that appellant deprived Desiree of custody of the baby for several days. She initially feared for the baby's safety, and appeared shocked by appellant's action. She felt less concerned after appellant called her, and fortunately the child was returned safely. There is sufficient evidence that appellant maliciously deprived Desiree of the custody of her child, in violation of section 278.5.

The fact that this incident had a safe conclusion does not preclude the finding of guilt. Section 278.6 sets out the relevant sentencing factors in aggravation and mitigation for violation of sections 278 and 278.5. Among these factors are the length of the abduction, whether the child is returned unharmed prior to arrest, and whether the defendant provided information and assistance leading to the child's safe return. The Legislature apparently contemplated that the child abduction statutes could be violated even if the abduction is brief, the child is unharmed, and the defendant provides information about the child's location. These are sentencing considerations, not limitations on the requisite intent for violation of the statutes. The evidence supports appellant's conviction for deprivation of child custody.

III

The court selected count 1, corporal injury on a cohabitant (§ 273.5, subd. (a)), as the base term for sentencing, and imposed the upper term of four years "based on the

defendant's prior record." Appellant claims that under *Cunningham v. California*, *supra*, 549 U.S. 270, the court improperly imposed an upper term sentence on count 1 based on facts that were neither found by the jury nor admitted by appellant.

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely v. Washington* (2004) 542 U.S. 296, 303, the Supreme Court explained that 'the "statutory maximum" under *Apprendi* is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." In *Cunningham v. California*, *supra*, 549 U.S. at page 274, the Supreme Court applied *Apprendi* and *Blakely* to invalidate California's then-existing determinate sentencing law (former § 1170, subd. (b)), which required the court to impose the middle term, unless there were circumstances in aggravation or in mitigation. The Supreme Court held that by giving the judge, not the jury, the authority to find the facts which expose a defendant to an elevated upper term sentence, this sentencing scheme violated the defendant's right to trial by jury.

In this case, the fact relied on by the trial court was appellant's prior criminal record. Recidivism is the exception to the right to a jury finding recognized in *Apprendi*. (530 U.S. at p. 490.) Appellant's record included sustained juvenile petitions for criminal threats (§ 422) and for assault with a deadly weapon other than a firearm or with force likely to produce great bodily injury (§ 245, subd. (a)(1)). Appellant also suffered an adult conviction for assault with a deadly weapon other than a firearm or with force likely to produce great bodily injury (§ 245, subd. (a)(1)) and for felon in possession of a firearm (§ 12021, subd. (a)(1)). Under the determinate sentencing law, "the presence of one aggravating circumstance renders it lawful for the trial court to impose an upper term sentence." (*People v. Black* (2007) 41 Cal.4th 799, 815.) On this record, there was no constitutional violation in the trial court's selection of the upper term sentence based on appellant's recidivism.

IV

Appellant was sentenced to a determinate term of 13 years, eight months, consecutive to two indeterminate life terms, consecutive to an indeterminate term of 125 years to life. He argues this sentence is cruel and unusual punishment under the constitutions of California and the United States.

"'Cruel and unusual punishment is prohibited by the Eight Amendment of the United States Constitution and article I, section 17 of the California Constitution. Punishment is cruel and unusual if it is so disproportionate to the crime committed that it shocks the conscience and offends fundamental notions of human dignity.' (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 358, fns. omitted.)" (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 568-569.) The Supreme Court has identified three techniques for determining whether a penalty offends this prohibition: examining the nature of the offense and the offender, comparing the punishment with the penalty for more serious crimes in the same jurisdiction, and comparing the punishment with the penalty for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425-427.)

The offenses in this case were numerous and serious, including two counts of kidnapping to commit sex crimes, forcible rape and forcible oral copulation, sexual penetration with foreign objects, assault with a deadly weapon, corporal injury on a cohabitant, all involving the same victim. He also was convicted of deprivation of child custody. The jury found appellant inflicted aggravated mayhem and torture in the commission of the sexual offenses. There is nothing disproportionate between the punishment and the nature of the offense.

As to the nature of the offender, appellant asserts his prior criminality was "minimal." Appellant's probation report refutes this claim. Beginning in 1993, appellant sustained juvenile petitions for making criminal threats and assault with a deadly weapon, and adult convictions for possession of a deadly weapon, grand theft of a vehicle, assault with a deadly weapon, and being a felon in possession of a firearm. He claims he was remorseful for his involvement in the charged activity, yet he remained a fugitive for

almost a year, and during that time, he abducted his baby from his wife's home. This conduct does not demonstrate remorse.

Appellant argues his punishment is exceeded only by the sentence of life without the possibility of parole or death for first degree murder, and that it is more severe than the penalty for second degree murder or voluntary manslaughter. We disagree.

Appellant's 25 years to life sentences on counts 5, 6, 7, 11, and 12 were not based solely on the underlying crimes. Instead, they were premised on the true findings that he committed mayhem or torture, pursuant to section 667.61, subdivision (d)(3), and that he kidnapped the victim and the movement of the victim substantially increased the risk of harm to her over and above the risk necessarily inherent in the underlying sexual offenses, pursuant to section 667.61, subdivision (d)(2). Appellant's sentence on each count cannot be compared to that for individual offenses where these additional findings were not made. (See *People v. Crooks* (1997) 55 Cal.App.4th 797, 807.) Given the number of offenses and the enhancing circumstances of each, appellant's sentence is neither disproportionate nor an abuse of discretion. (See *People v. Wallace* (1993) 14 Cal.App.4th 651 [sentence of 283 years, 8 months not cruel or unusual in light of the number of offenses and victims].)

He claims this punishment is disproportionate to the more narrowly drawn "one strike" sentencing laws of other states. He cites no authority to support this claim. In *People v. Crooks, supra*, 55 Cal.App.4th at pages 808-809, the court found California's sentencing scheme for rape under section 667.61 was not disproportionate to the sentencing laws in other jurisdictions, noting that a federal court had rejected an Eighth Amendment attack on Louisiana's mandatory sentence of LWOP for aggravated rape because at least four other jurisdictions provided for life sentences for rape.

Finally, appellant argues his sentence is cruel and unusual under the Eight Amendment because it is disproportionate to his "personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801.) There is no interpretation of the facts in this case which would lessen appellant's personal responsibility and moral guilt, and thus no violation of the Eighth Amendment.

V

Appellant claims that he is entitled to conduct credits. Appellant was given 224 days of actual custody credit, but no conduct credit. Respondent agrees that this was error. Under section 2933.1, subdivision (a), appellant was entitled to 15 percent of 224 days as presentence conduct credit, or 34 days. The judgment should be modified to reflect 34 days of conduct credit.

DISPOSITION

We modify the judgment to show 34 days of conduct credit, and affirm as modified.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.